

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

MASTERPIECE LEADED WINDOWS  
CORPORATION,

Plaintiff,

v.

SONNY J. JOSLIN, an individual, et al.,

Defendants.

Case No. 08-CV-0765-JM (JMA)

**ORDER GRANTING PLAINTIFF'S  
MOTION TO MODIFY SCHEDULING  
ORDER**

**[Doc. 17]**

Plaintiff Masterpiece Leaded Windows Corporation ("Plaintiff") has filed a motion to modify the scheduling order. Defendants Sonny J. Joslin, Eric James Tingey, and Decor A Door & Window, Inc. ("Defendants") oppose. For the reasons set forth below, Plaintiff's motion is **GRANTED**.

**I. BACKGROUND**

On September 16, 2008, the Court issued a Case Management Conference Order Regulating Discovery and Other Pretrial Proceedings ("scheduling order") which contained, as pertinent here, the following deadlines:

Expert disclosure deadline	February 13, 2009
Rebuttal expert disclosure deadline	March 20, 2009
Discovery cutoff	April 17, 2009
Dispositive motion filing cutoff	May 15, 2009

1 Sept. 16, 2008 Order at ¶¶ 4-6.<sup>1</sup>

2 In January 2009, Plaintiff's counsel, Gastone Bebi, Esq., a sole practitioner,  
3 switched from a Palm PDA (personal digital assistant) to an iPhone, which necessitated  
4 that he convert from a Palm electronic calendar to Microsoft Outlook's electronic  
5 calendaring system. Bebi Decl., ¶ 5. All of the Palm data had to be manually inputted  
6 into the Outlook program. Id., ¶ 6. Mr. Bebi understood that all dates, "tickles", and  
7 calendaring data were transferred into Outlook by January 26, 2009; on that date, he  
8 stopped using the Palm PDA and Palm calendar and relied solely on the Outlook  
9 program for calendaring alerts. Id.

10 Unbeknownst to Mr. Bebi, none of the dates and reminders regarding this case  
11 were transferred into Outlook. Id., ¶ 7. Mr. Bebi has acted as litigation counsel for  
12 Plaintiff on several matters over the course of several years. Id., ¶ 2. During January  
13 2009, Mr. Bebi was handling five potential litigation files on behalf of Plaintiff, not  
14 including this matter. Id., ¶ 8. Mr. Bebi was also acting as coverage counsel for Plaintiff  
15 in a case filed in the Central District of California. Id. Because he was not acting as  
16 litigation counsel in that matter, Mr. Bebi instructed the person transferring his  
17 calendaring data to disregard all dates for that case. Id. According to Mr. Bebi,  
18 "Confusion ensued, and the dates relating to [the] instant matter, my only other then  
19 pending federal case, were not transferred to my electronic calendar." Id. The last  
20 "tickle" that Mr. Bebi received regarding this case was for the January 12, 2009  
21 telephonic Case Management Conference ("CMC"), which he participated in. Id., ¶ 9.

22 In late December 2008, Mr. Bebi asked his paralegal to draft Interrogatories and  
23 a Request for Production of Documents in this matter. Id., ¶ 11. He also entered a  
24 reminder and a "tickle" for February 1, 2009 to send out the discovery on his Palm  
25 calendaring software. Id. This data was not subsequently transferred into the Outlook  
26 program. Id. In January 2009, Mr. Bebi's paralegal left to work for another attorney,  
27

---

28 <sup>1</sup>The Court subsequently continued the deadline for the filing of dispositive motions to June 5, 2009. See Apr. 16, 2009 Order at 3.

1 and the rough drafts of the discovery were placed in the file. Id. On March 17, 2009,  
 2 Mr. Bebi's law clerk came across the rough drafts, and placed them in Mr. Bebi's in-box  
 3 for review. Id., ¶ 12. Mr. Bebi states that he was "unaware of the deadlines associated  
 4 with this case" due to "the press of business, the lack of alerts regarding the discovery  
 5 cut-off, and having to deal with [his] caseload while looking for another paralegal." Id.  
 6 The discovery was subsequently served on March 23, 2009. Id.<sup>2</sup>

7 On February 5, 2009, counsel for Defendants, Chandra Moore, Esq., sent Mr.  
 8 Bebi an email which stated, in relevant part:

9 As a reminder, at the CMC on January 12, 2009, you informed me and  
 10 Judge Adler that you had gathered documents to support your client's  
 11 position . . . . I am following up because we have expert disclosures due  
 on February 13, 2009.

12 Defs.' Opp'n at 2; Moore Decl., Ex. A. Ms. Moore also inquired about whether Plaintiff  
 13 intended to proceed with the litigation. Id. Mr. Bebi sent a responsive email on  
 14 February 6, 2009 in which he stated that he would try to get back to Ms. Moore by that  
 15 afternoon regarding her inquiry. Defs.' Opp'n at 3; Moore Decl., Ex. A. Mr. Bebi had  
 16 previously decided, as of December 2008, that retaining a forensic accountant expert  
 17 would not be cost-efficient as Plaintiff had received information that Defendant Decor A  
 18 Door & Window, Inc. was going out of business. Bebi Decl., ¶ 10.

19 Plaintiff contends that "but for the calendaring problem, the loss of staff and  
 20 confusion in the calendaring, the discovery that was served would have been  
 21 propounded within the time mandated by the court." Pl.'s Reply at 2. Plaintiff presently  
 22 seeks a short continuance of the discovery cutoff in order to obtain responses to the  
 23 interrogatories and document requests already served, and to depose Defendant Joslin.  
 24 Pl.'s Mem. at 2. Plaintiff does not contemplate or request any other discovery. Id.

---

25  
 26 <sup>2</sup>As the Court has previously indicated (see Apr. 16, 2009 Order at 2 n.1), this discovery  
 27 was not timely served pursuant to the terms of the Court's scheduling order, which requires all  
 28 discovery to be "initiated a sufficient period of time in advance of the cutoff date, so that it may  
 be completed by the cutoff date, taking into account the times for service, notice, and response  
 as set forth in the Federal Rules of Civil Procedure." Sept. 16, 2008 Order at ¶ 5 (emphasis in  
 original).

Defendants oppose, and argue that this situation was created by Plaintiff's own doing and is "without good cause or substantial justification." Defs.' Opp'n at 2.

## II. LEGAL STANDARDS

Under Rule 16(b) of the Federal Rules of Civil Procedure, the court must issue a scheduling order after consulting with counsel at a scheduling conference or by telephone, mail, or other means. Fed. R. Civ. P. 16(b)(1). "The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions." Fed. R. Civ. P. 16(b)(3). "A schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The "good cause" standard under Rule 16(b) primarily considers the diligence of the party seeking the amendment. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992); see also Fed. R. Civ. P. Advisory Committee Notes, 1983 Amendment ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."). "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification." Johnson, 975 F.2d at 604. In other words, if the moving party was not diligent, the inquiry should end. Id.

"Central to [the] required showing of diligence is whether the movant discharged [its] obligation under Rule 16 to collaborate with the district court in managing the case." Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999). The pertinent inquiry includes: (1) whether the movant was diligent in assisting the Court in creating a workable Rule 16 scheduling order, (2) whether the movant's noncompliance with deadlines occurred, notwithstanding its diligent efforts to comply, because of matters unforeseen at the time of the Rule 16 scheduling conference, and (3) whether the movant was diligent in seeking amendment of the scheduling order once it became apparent that it could not comply with the order. Id. at 608.

//

### 1 III. DISCUSSION

2 Plaintiff satisfies all of the above diligence inquiries and thus has demonstrated  
3 good cause for its motion to modify the scheduling order. While the Court is, of course,  
4 concerned that Plaintiff's discovery was not served in a timely manner, the Court finds  
5 nothing to indicate that Mr. Bebi's version of events is anything other than truthful and is  
6 convinced that the mistake in the calendaring of the dates in this case was completely  
7 inadvertent. The subsequent turnover in Mr. Bebi's office staff then further exacerbated  
8 the problem, particularly given the fact that Mr. Bebi is a sole practitioner. Mr. Bebi did  
9 not realize, until the April 15, 2009 conference call, that Plaintiff's discovery had not  
10 been timely served and that the discovery cutoff was only two days away. He then  
11 immediately sought permission from the Court to modify the scheduling order by  
12 verbally requesting a modification of the schedule as well as by seeking permission to  
13 file a written motion on the matter. Plaintiff did not intentionally disregard the scheduling  
14 order nor did it act in a cavalier manner when it discovered that the discovery cutoff was  
15 immediately upon it.

16 Although Defendant essentially argues that Ms. Moore's email to Mr. Bebi in  
17 February regarding the deadline for expert disclosures should have caused him to look  
18 at the scheduling order or to consider the status of the schedule, it is not unreasonable  
19 that he did not do so. Plaintiff, by that time, had already determined that it would not  
20 retain a damages expert, and the Court does not believe that Mr. Bebi necessarily  
21 should have been alerted by the email that the discovery period was drawing to a close.

22 This is not a situation in which Plaintiff treated the scheduling order as a  
23 "frivolous piece of paper." Johnson, 975 F.2d at 610. As soon as Plaintiff realized the  
24 oversight, it sought to correct it, and now seeks only a short extension of time to  
25 complete a relatively small amount of discovery. A short extension of the discovery  
26 cutoff, and the resultant short extension of other remaining dates in the case, will not  
27 significantly disrupt the Court's management of this case nor would it "reward the  
28 indolent and cavalier." Id.

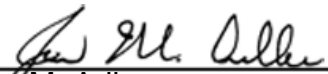
1 Defendants argue that they will be prejudiced if discovery is reopened, as they  
2 will be "forced to waste a significant amount of time and money in order to prepare for a  
3 trial, including participating in discovery and depositions that should have taken place  
4 long ago." Defs.' Opp'n at 5. It was only because of Plaintiff's inadvertence, however,  
5 that Defendants were not previously required to respond to discovery. The reopening of  
6 discovery will require Defendants to do nothing more than what they would have been  
7 required to do had Mr. Bebi's calendaring issues not occurred. In any event, the focus  
8 of the inquiry on a motion to modify a scheduling order is upon the moving party's  
9 reasons for seeking modification and whether good cause has been demonstrated, not  
10 upon the prejudice to the party opposing the modification. Johnson, 975 F.2d at 604.<sup>3</sup>

11 **IV. CONCLUSION**

12 For the foregoing reasons, Plaintiff's motion to modify the scheduling order is  
13 **GRANTED**. The Court will separately issue an amended scheduling order.

14 **IT IS SO ORDERED.**

15 DATED: May 22, 2009

16  
17   
18 Jan M. Adler  
U.S. Magistrate Judge

19  
20  
21  
22  
23  
24  
25  
26  
27  
28 

---

<sup>3</sup>The Court makes no finding as to whether Plaintiff complied with its initial disclosure obligations under Rule 26(a)(1) as that issue is not properly before the Court.